

**UNITED STATES DISTRICT COURT**  
**DISTRICT OF NEVADA**

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KIMBERLY TATE,

Plaintiff,

vs.

NANCY A. BERRYHILL, Acting Commissioner  
of Social Security

Defendant.

2:16-cv-02386-GMN-VCF

**REPORT AND RECOMMENDATION**

MOTION TO REMAND [ECF No. 18]; CROSS-  
MOTION TO AFFIRM [ECF No. 19]

This matter involves Plaintiff Kimberly Tate’s request for a remand of the Administrative Law Judge’s (“ALJ”) final decision denying her social security benefits. Before the Court are Tate’s Motion for Remand (ECF No. 18) and the Acting Commissioner’s Cross-Motion to Affirm and Opposition to Plaintiff’s Motion for Reversal (ECF Nos. 19). For the reasons stated below, the Court recommends denying Plaintiff’s Motion to Remand and granting the Commissioner’s Cross-Motion.

**STANDARD OF REVIEW**

The Fifth Amendment prohibits the government from depriving persons of property without due process of law. U.S. Const. amend. V. Social security Plaintiffs have a constitutionally protected property interest in social security benefits. *Mathews v. Eldridge*, 424 U.S. 319 (1976); *Gonzalez v. Sullivan*, 914 F.2d 1197, 1203 (9th Cir. 1990). When the Commissioner of Social Security renders a final decision denying a Plaintiff’s benefits, the Social Security Act authorizes the District Court to review the Commissioner’s decision. *See* 42 U.S.C. § 405(g); 28 U.S.C. § 636(b) (permitting the District Court to refer matters to a U.S. Magistrate Judge).

The District Court's review is limited. *See Treichler v. Comm'r of SSA*, 775 F.3d 1090, 1093 (9<sup>th</sup> Cir. 2014) ("It is usually better to minimize the opportunity for reviewing courts to substitute their discretion for that of the agency.") The Court examines the Commissioner's decision to determine whether (1) the Commissioner applied the correct legal standards and (2) the decision is supported by "substantial evidence." *Batson v. Comm'r of Soc. Sec. Admin.*, 359 F.3d 1190, 1193 (9<sup>th</sup> Cir. 2004). Substantial evidence is defined as "more than a mere scintilla" of evidence. *Richardson v. Perales*, 402 U.S. 389, 401 (1971). Under the "substantial evidence" standard, the Commissioner's decision must be upheld if it is supported by enough "evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 217 (1938) (defining "a mere scintilla" of evidence). If the evidence supports more than one interpretation, the Court must uphold the Commissioner's interpretation. *See Burch v. Barnhart*, 400 F.3d 676, 679 (9<sup>th</sup> Cir. 2005). The Commissioner's decision will be upheld if it has any support in the record. *See, e.g., Bowling v. Shalala*, 36 F.3d 431, 434 (5<sup>th</sup> Cir. 1988) (stating the court may not reweigh evidence, try the case de novo, or overturn the Commissioner's decision if the evidence preponderates against it).

## DISCUSSION

The Administrative Law Judge ("ALJ") followed the five-step sequential evaluation process for determining whether an individual is disabled. 20 C.F.R. § 404.1520. The ALJ concluded Plaintiff had not engaged in substantial gainful activity since the alleged onset date of March 15, 2011. (AR<sup>1</sup> at 9). The ALJ found Plaintiff had numerous severe impairments which "significantly limit the ability to perform basic work activities." (*Id.*). These were: disorder of anemia; headaches; depression; and anxiety (20 CFR 404.1520(c) and 416.920(c)). (*Id.*). The ALJ found Plaintiff's impairments did not meet or medically equal the severity of a listed impairment in 20 CFR Part 404, Subpart P, Appendix 1. (*Id.* at 13.). The ALJ concluded Plaintiff had the residual functional capacity to perform unskilled, sedentary work with the

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<sup>1</sup> The Administrative Record ("AR") is found at ECF No. 15-1.

1 following additional limitations; she can adapt to routine work changes; occasionally interact with  
2 supervisors and co-workers; but she would be unable to interact with the general public. (*Id.* at 15).

3 The ALJ concluded that Plaintiff was not under a disability within the meaning of the Social  
4 Security Act from March 15, 2011 through the date of the decision on March 25, 2015. (*Id.* at 20).

5 Plaintiff challenges the ALJ's conclusions on the ground that the ALJ improperly rejected  
6 Plaintiff's testimony. (ECF No. 18). Plaintiff argues that the ALJ failed to provide clear and convincing  
7 findings in support of the ALJ's rejection of Plaintiff's testimony. *Id.*

8 The Commissioner argues the ALJ's decision is supported by substantial evidence. (ECF. 19 at  
9 1). The Commissioner argues the ALJ properly discounted Plaintiff's testimony due to inconsistencies  
10 with the medical evidence, Plaintiff's treatment, inconsistencies between activities, and the ALJ properly  
11 found that Plaintiff's work activity and receipt of unemployment benefits belied her allegations of  
12 disability. (ECF No. 19 at 13).

### 13 **Discounting the Plaintiff's Testimony**

14 The ALJ must evaluate the Plaintiff's testimony using a two-step analysis. *Vasquez v. Astrue*,  
15 572 F.3d 586, 591 (9th Cir. 2009). "First, the ALJ must determine whether the Plaintiff presented  
16 objective medical evidence of an underlying impingement which could reasonably be expected to produce  
17 the pain or other symptoms alleged." *Lingenfelter v. Astrue*, 504 F.3d 1028, 1036 (9th Cir. 2007).  
18 "Second, if the Plaintiff meets this first test, and there is no evidence of malingering, the ALJ can reject  
19 the Plaintiff's testimony about the severity of her symptoms only by offering specific, clear and convincing  
20 reasons for doing so." *Lingenfelter v. Astrue*, 504 F.3d 1028, 1036 (9th Cir. 2007). General findings are  
21 inadequate as the ALJ must identify what testimony is not credible and what evidence undermines the  
22 Plaintiff's complaints. *Berry v. Astrue*, 622 F.3d 1228, 1234 (9th Cir. 2010).

23 The ALJ found Plaintiff's medically determinable impairments could reasonably be expected to  
24 cause the alleged symptoms. (AR at 16). However, the ALJ found the Plaintiff's statements concerning  
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1 the “intensity, persistence, and limiting effects of these symptoms” to be inconsistent with the medical  
2 evidence and other evidence on the record. *Id.* The ALJ discounted Plaintiff’s assertions of disabling  
3 pain because of inconsistencies with the medical record and inconsistencies with Plaintiff’s daily  
4 activities. *Id.* at 17. The ALJ therefore provided specific, clear and convincing reasons for discounting  
5 Plaintiff’s testimony.

#### 6 **Inconsistencies in Plaintiff’s Testimony**

7 The ALJ found Plaintiff’s complaints were inconsistent with her daily activities. The ALJ finds  
8 that the Plaintiff’s statements concerning the intensity, persistence and limiting effects of her symptoms  
9 are not entirely credible. (AR at 16). An ALJ may use daily activities to form the basis of adverse  
10 credibility determination when the activities “involv[e] the performance of physical functions that are  
11 transferable to a work setting.” *Orn v. Astrue*, 495 F.3d 625, 639 (9th Cir. 2007) (quoting *Fair v. Bowen*,  
12 885 F.2d 597, 603 (9th Cir. 1989). The ALJ may consider any of the Plaintiff’s daily activities that “may  
13 be seen as inconsistent with the presence of a condition which would preclude all work activity.” *Curry*  
14 *v. Sullivan*, 925 F.2d 1127, 1130 (9th Cir. 1990).

15 The ALJ found Plaintiff’s allegations of functional limitations to be inconsistent with her activities  
16 of daily living. (AR at 16). In Plaintiff’s testimony, she reports that her aunt takes her to the store, takes  
17 her shopping, and help her with cooking. (ECF NO. 15-1 at 43).

18 The ALJ found that contrary to Plaintiff’s testimony, “[i]n activities of daily living, the claimant  
19 has mild restrictions. The claimant reported in August 2012 that she cared for her son and their household.  
20 She prepared meals, did household chores and shopped in stores, by telephone and by computer. In a  
21 consultative examination in November 2012, the claimant reported reading news online, watching  
22 television and sleeping during the day. She cooked, washed dishes, vacuumed and did laundry. She  
23 handled personal care independently.” (AR at 16 and ECF No. 15-1 at 270).

1 Plaintiff states that the ALJ rejected Tate’s testimony based on the belief that the testimony is not  
2 credible because it lacks support in the objective medical evidence. (ECF NO. 18 at 7).

3 The Court finds the ALJ provided clear and convincing reasons for discounting Plaintiff’s  
4 assertions of disabling pain and physical limitations. (AR 16-17). The ALJ noted Plaintiff’s complaints  
5 headaches and abdominal pain. (AR 16). In reviewing Plaintiff’s medical records, the ALJ found no  
6 evidence of a heart condition that would result in any physical limitations. (AR 16). Plaintiff’s chest x-  
7 rays and EKG results throughout the record have been interpreted as normal. (ECF NO. 15-1 at 475 to  
8 492, 502 to 556, 701 to 713).

9 The ALJ notes that complaints of abdominal pain have been treated on an intermittent basis,  
10 generally by emergency department providers. (AR 16). The ALJ found no evidence of etiology or  
11 significant limitations due to stomach pain. (ECF NO. 15-1 at 701 to 713). The ALJ found no evidence  
12 of recent treatment with infusion or medication for iron-deficiency anemia. (ECF NO. 15-1 at 371 to 375).

13 Substantial evidence supports the ALJ’s assessment of Plaintiff’s complaints of headaches.  
14 Following emergency room treatment in November 2012, Plaintiff’s complaints of headaches were  
15 “resolved,” and she felt “significantly better with a completely nonfocal neurological exam”; Ketan Patel,  
16 M.D., the treating emergency room physician, described Plaintiff as “completely normal” (AR 13, 523-  
17 24). Plaintiff admitted at the hearing that her medication was effective in alleviating her headaches (AR  
18 36). *See Warre v. Comm’r of Soc. Sec.*, 439 F.3d 1001, 1006 (9th Cir. 2006) (“Impairments that can be  
19 controlled effectively with medication are not disabling”); *Celaya v. Halter*, 332 F.3d 1177, 1181 (9th Cir.  
20 2003) (affirming the ALJ’s evaluation of the claimant’s allegations of pain where the ALJ “reasonably  
21 noted” reports that the claimant’s pain had “come under control”).

22 Substantial evidence supports the ALJ’s assessment of Plaintiff’s psychiatric complaints. ALJ  
23 noted that the objective clinical findings and treatment records did not support Plaintiff’s claims of  
24 disabling symptoms and functional limitations (AR 13, 16-18). *See* 20 C.F.R. §§ 404.1529(c)(2),  
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1 416.929(c)(2); *Rollins*, 261 F.3d at 857. Specifically, as the ALJ noted, Paul Singh, M.D., Plaintiff's  
2 treating physician, did not obtain any "psychological or psychiatric findings" that were consistent with  
3 Plaintiff's alleged symptoms (AR 17). In addition, at her November 2012 consultative psychological  
4 examination, Plaintiff was "very cooperative and friendly," with normal grooming, speech, and expressive  
5 language (AR 17, 462, 464, 466).

6 The ALJ gave significant weight to Verna Fabella Hicks, Ph.D., who observed that Plaintiff was  
7 functioning in the "average range of cognitive ability" and was able to perform serial sevens subtractions,  
8 serial threes subtractions, simple math, and alphanumeric counting without difficulty (AR 17, 466). Dr.  
9 Fabella-Hicks reported that Plaintiff had sufficient ability to maintain persistence and pace during the  
10 consultative examination (AR 466). Dr. Fabella-Hicks also reported that Plaintiff demonstrated "good"  
11 abstract reasoning and judgment (AR 465).

12 The ALJ noted that Plaintiff's treatment records illustrated an improvement in her alleged  
13 psychiatric symptoms through outpatient counseling and medication. *See* 20 C.F.R. §§ 404.1529(c)(3),  
14 416.929(c)(3); *Warre*, 439 F.3d at 1006; *see also Morgan v. Comm'r of Soc. Sec. Admin.*, 169 F.3d 595,  
15 599 (9th Cir. 1999) (the ALJ properly rejected the claimant's testimony where there were reports that the  
16 claimant's mental symptoms improved with medication).

17 Substantial evidence supports the ALJ's findings that Plaintiff's work activity and receipt of  
18 unemployment benefits after her alleged onset of disability as a basis for rejecting her claims of disabling  
19 symptoms and functional limitations. (AR 17).

20 Under controlling Ninth Circuit precedent, the receipt of unemployment benefits "can undermine  
21 a claimant's alleged inability to work fulltime." *See Carmickle v. Comm'r of Soc. Sec. Admin.*, 533 F.3d  
22 1155, 1161-62 (9th Cir. 2008) (*citing Copeland v. Bowen*, 861 F.2d 536, 542 (9th Cir. 1988)). Here, the  
23 ALJ noted that Plaintiff received unemployment benefits during the first three quarters of 2012 – a year  
24 (and more) after she alleged she was disabled under the Act; as the ALJ stated, Plaintiff, in essence,  
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1 admitted that she was “able and willing to work during the time she claims she was disabled” (AR 17, 32,  
2 223-26).

3 **Conclusion**

4 The Commissioner did not err in denying Tate’s claim. The Court finds the ALJ applied the  
5 correct legal standards and made conclusions supported by substantial evidence when discounting the  
6 testimony of Plaintiff Tate.

7 ACCORDINGLY,

8 IT IS HEREBY RECOMMENDED that Plaintiff’s Motion for Remand is DENIED (ECF No. 18)  
9 and the Acting Commissioner’s Cross-Motion to Affirm and Opposition to Plaintiff’s Motion for Reversal  
10 is GRANTED (ECF No. 19).

11 DATED this 3rd day of January, 2020.

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13 CAM FERENBACH  
14 UNITED STATES MAGISTRATE JUDGE  
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